INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement:	
I. The charges in the indictment and their disposition	2
II. The evidence against petitioner	4
III. Evidence of other events	10
IV. The trial court's instructions	13
Argument:	
Introduction and summary	15
I. Petitioner's conviction is overwhelmingly supported by evidence other than the statements of co-conspirators, which were in any event properly admitted under narrow traditional principles	19
II. Petitioner was properly tried with his co-defendants even though his arrest caused his withdrawal from the conspiracy before its termination	30
III. Petitioner's remaining contentions are without merit	36
A. An impartial jury was properly empaneled	37
B. The trial was properly conducted by the trial judge	39
Conclusion	41

421-399—71——1

CITATIONS

Cases:

	Page
Barnes v. *United States*, 381 F. 2d 263	35
Bayless v. *United States*, 381 F. 2d 67	36, 40
Bruton v. *United States*, 391 U.S. 123	21, 28, 36
California v. *Green*, 399 U.S. 149	27, 28
Chapman v. *California*, 386 U.S. 18	21
Delaney v. *United States*, 263 U.S. 586	22
Dutton v. *Evans*, 400 U.S. 74	18, 19, 20, 22, 28, 29
Fernandez v. *United States*, 329 F. 2d 899	35
Fiswick v. *United States*, 329 U.S. 211	32, 33
Frazier v. *Cupp*, 394 U.S. 731	21, 30
Grunewald v. *United States*, 353 U.S. 391	18, 19
Harrington v. *California*, 395 U.S. 250	21
Krulewitch v. *United States*, 336 U.S. 440	18, 19
Lutwak v. *United States*, 344 U.S. 604	18
Opper v. *United States*, 348 U.S. 84	34
Parker v. *United States*, 404 F. 2d 1193, certiorari denied, 394 U.S. 1004	36
Pinkerton v. *United States*, 328 U.S. 640	31, 32
Posey v. *United States*, 416 F. 2d 545, certiorari denied, 397 U.S. 946	35
Schaffer v. *United States*, 362 U.S. 511	34
Swain v. *Alabama*, 380 U.S. 202	39
United States v. *Agueci*, 310 F. 2d 817, certiorari denied, 372 U.S. 959	33, 35
United States v. *Ballentine*, 410 F. 2d 375, certiorari denied, 397 U.S. 928	29
United States v. *Boone*, 401 F. 2d 659, certiorari denied *sub nom.* Jackson v. United States, 394 U.S. 933	29
United States v. *Jordan*, 399 F. 2d 610, certiorari denied, 393 U.S. 1005	35
United States v. *Rabin*, 316 F. 2d 564	35

Cases—Continued

	Page
United States v. *Roselli*, 432 F. 2d 879, certiorari denied February 22, 1971 (No. 1029, this Term)	35
United States v. *Vida*, 370 F. 2d 759, certiorari denied, 387 U.S. 910	35
Wong Sun v. *United States*, 371 U.S. 471	22
Constitution, statute and rules:	
United States Constitution, Confrontation Clause, Sixth Amendment	19
18 U.S.C. 371	33
Rule 8(b), F. R. Cr. P	34
Rule 14, F. R. Cr. P	34

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 5250

JAMES HERMAN BOSTIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 37–62) is reported at 424 F. 2d 951.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1970. The petition for a writ of certiorari was filed on May 19, 1970, and was granted on January 11, 1971 (A. 62). The jurisdiction of this Court rests on 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether petitioner's convictions on the substantive and conspiracy charges were tainted by inadmissible evidence.

2. Whether, in the circumstances of this case, petitioner was prejudiced by the refusal of the trial judge to grant his motion for severance.

3. Whether petitioner was otherwise denied a fair trial.

STATEMENT

I. THE CHARGES IN THE INDICTMENT AND THEIR DISPOSITION

Petitioner and seven others were indicted in the United States District Court for the Middle District of Tennessee on various counts of an eight-count indictment (A. 1–5). Count one charged all with conspiracy to commit armed robbery of federally insured banks and to place lives of bank employees in jeopardy (A. 1). Eleven overt acts were charged in furtherance of the conspiracy, with petitioner specifically named as participating only in Overt Act 1—that on April 24, 1967, he and co-conspirator James Larry Ferguson (who was later killed) robbed the Bordeaux Branch of the Commerce Union Bank of Nashville, Tennessee (A. 2). The remaining ten overt acts involved the flight of the participants in that robbery and receipt and concealment of the funds obtained (Overt Acts 2 and 3);[1] the planning and commission

[1] Overt Act 2 charged two of the conspirators (Georgia Ethridge and Sammy Ray Cole) with assisting petitioner and Ferguson in making their escape (A. 2).

of other bank robberies by certain of petitioner's co-conspirators (Overt Acts 4–6, 9); the possession of an unregistered sawed-off shotgun by one co-conspirator (Overt Act 7); the harboring of petitioner by co-conspirator William Beard with knowledge of a federal warrant for his arrest (Overt Act 8); and the planning and execution of the killing of Ferguson by conspirators Gary Ethridge and Beard in order to prevent him from disclosing to law enforcement agents the offenses charged in the indictment (Overt Acts 10 and 11; A. 3).

Count two charged petitioner, Gary Ethridge, Georgia Ethridge, John Leeman,[2] and Sammy Ray Cole with the robbery of the Bordeaux Bank on April 24, 1967, and count three charged that petitioner, both Ethridges, Leeman and Cole possessed money from the Bordeaux Bank robbery (A. 3).

Petitioner was not named in any of the remaining substantive counts[3]—including count eight which charged that on September 23, 1967 (more than three months after petitioner's arrest), defendants Beard and Gary Ethridge killed James Ferguson to avoid apprehension for the bank robberies (A. 5).

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[2] The charges against Leeman, whose trial had been severed (A. 103–104), were dismissed several months after the trial because of his death (Docket Entries A. XVI).

[3] Count four, charging co-conspirator Beard with concealment of petitioner, a federal fugitive, and count five charging Beard with possession of an unregistered firearm, were severed, and, subsequent to the trial, dismissed on the government's motion (A. 67, 69). Counts six and seven charged various of the defendants with the robbery of the Third National Bank of Nashville, Tennessee, on August 3, 1967.

Petitioner was found guilty of each of the three counts in which he was charged. He received sentences of five years on count one (the conspiracy count), twenty years on count two, and ten years on count three, the latter two sentences to run concurrently with each other but consecutively to the sentence on the conspiracy count.[4] The court of appeals affirmed (A. 37–62).

II. THE EVIDENCE AGAINST PETITIONER

1. The two substantive counts of which petitioner was convicted dealt with the robbery of the Bordeaux Bank in Nashville, Tennessee on April 24, 1967. Leeman (who was also named in these two counts but whose trial had been severed) testified as a government witness concerning the planning of the Bordeaux Bank robbery. He stated that sometime in April 1967, after several months of general discussion, he and Gary Lee Ethridge talked "seriously" about robbing the Bordeaux Bank (A. 278–280). Agreeing that direct participation "wasn't no place for us" (A. 280), they decided to find someone to commit

[4] Disposition as to the other defendants was as follows: Each was found guilty on the conspiracy charge. Gary Lee Ethridge was found guilty on counts two, three, and eight, and acquitted on count seven. Georgia Ethridge was acquitted on counts two and three. Beard was convicted on counts seven and eight and acquitted on count six. Cole was found guilty on counts two and three. Self was found not guilty on counts six and seven (A. 38).

[5] The petitions for writs of certiorari filed by the six other defendants were denied by this Court on January 11, 1971 (Nos. 5418, 5427, 5428, 5437, O.T. 1970).

the robbery. Larry Ferguson was approached and agreed to take part in the robbery (A. 281). According to Leeman, Ferguson advised that he could get petitioner—who had just broken out of the penitentiary and needed some money[6]—to assist (A. 281–282). The plans for the robbery and escape were developed in some detail at a three to four hour meeting at the Ethridge home on April 21, 1967, attended by Leeman, Gary Ethridge, Ferguson and petitioner (A. 283, 289–290, 295–296). Following this meeting, petitioner and Ferguson were taken to a motel in Manchester, Tennessee, where they stayed during the weekend;[7] the purpose of leaving Nashville was to avoid the possibility of petitioner's being arrested (A. 290–291). On April 24, the morning of the bank robbery, Ethridge, Leeman and Cole drove to Manchester and brought Ferguson and petitioner back to Nashville (A. 290–291). The bank was robbed that day pursuant to the plans formulated at the April 21 meeting (A. 283–284, 289–290).

Leeman testified that after robbing the bank, the plan was for petitioner and Ferguson to drive to the parking lot of a local hospital, where co-defendant Cole would be waiting; at this point they were to

[6] Leeman was not certain whether petitioner or Ferguson had told him of petitioner's escape from the penitentiary (A. 282).

[7] A motel manager testified that a person named "Ferguson" had registered at the motel on April 21 and stayed with another man; both checked out on the 24th (Tr. 2579–2580). The two arrived in a Mustang which state vehicle records showed to be registered to Georgia Ethridge (Tr. 2585).

switch cars—from a Pontiac to a stolen Cadillac—and then drive off. Cole and petitioner were to get out of the car and hide in the woods, while Ferguson was to drive to a nearby "beer joint" (A. 286–288, 292). Georgia Ethridge was to pick up Ferguson and, after dark, to get petitioner and Cole from the woods (A. 288–289, 293). Shortly after the robbery, Leeman and Gary Ethridge met at the Ethridge house; they were soon joined by Georgia Ethridge and Ferguson (A. 292–293). Ferguson said "they had robbed a bank" and obtained a "sack full of money" (A. 293; see A. 289–290, 308). By prearrangement, Leeman, Ethridge, Cole, Ferguson and petitioner Bostic met some hours after the robbery at the home of one Perry Patton and divided equally the $29,000 taken in the robbery (A. 290, 293–294). Leeman testified that following this he and Gary Ethridge took petitioner to Louisville to "[g]et him out of town" (A. 294).

Judith Farmer, who had been Bostic's girl friend at the time of the robbery, testified as a government witness (A. 404–405) that on the evening of the robbery petitioner picked her up in Nashville driving a new car and wearing a "fancy" suit and a diamond ring (A. 415–416). They then commenced a journey which ultimately led them to Daytona Beach, Florida (where she met co-conspirators Beard and Ferguson); after a stay there they returned to Bowling Green, Kentucky (A. 405–406, 408, 416–417, 425). The night their trip began, petitioner showed her a large sum of money (A. 407). When they arrived in Louisville, he showed her a suitcase of money which he said had come from

the robbery of the Bordeaux Bank (A. 407, 416); he told her that he had personally netted $5,750 from the robbery (A. 406–407).

During their stay in Daytona Beach, petitioner described the robbery to Miss Farmer in detail (A. 417). He said that he and Ferguson had entered the bank and robbed it; that he had used a pistol and Ferguson a sawed-off shotgun; that he had worn black boots which he had later disposed of; that before entering the bank he had discarded the "nylon stocking" mask he was supposed to wear because it bothered him and "just wore sun-glasses"; that Ferguson had worn a stocking mask during the robbery; and that in addition to regular currency petitioner had taken a bag of pennies worth $50.00 (A. 417–419).[8]

Shirley Anne Burton, petitioner's cousin and Miss Farmer's friend, who joined Miss Farmer and petitioner in Florida (A. 436–438), testified that petitioner had "almost cracked up" when he heard that the authorities were trying "to pin" the Bordeaux robbery on "other guys" who had robbed a different bank that same day (A. 439, 436–440).

The government also introduced testimony of wit-

[8] Petitioner further told her that Gary Ethridge had planned the robbery; that a Pontiac and Cadillac, provided by Ethridge, had been used as getaway cars; that, after the robbery, he had driven the Pontiac from the bank; that the cars had been switched at a local hospital where Cole was waiting with the Cadillac; that he had been let out in the woods; and that he had been picked up later in the day, after which the loot had been divided into five equal portions at Patton's house (A. 421–424). This accorded with Leeman's testimony about the escape plans (see *supra*, pp. 5–6).

nesses to the robbery which dovetailed with Miss Farmer's testimony concerning the wearing apparel of the two robbers, the type of weapons employed, the fact that the man with sunglasses and black boots took $50.00 worth of pennies from the vault and the fact that the robbers left the bank in a 1967 Pontiac (A. 320–327; see also the corroborative testimony of bank customers, A. 328–330). The license number on the Pontiac was taken down by a merchant who witnessed the getaway (A. 331). The car, which had been stolen (A. 359–360), was later recovered at the local hospital (A. 332–333). An employee of the hospital testified that he had seen a white Cadillac parked in the lot for several days prior to the robbery in the same spot where the Pontiac was recovered (A. 333–334).[9]

2. There was also evidence that petitioner and certain of his co-conspirators planned and attempted to burglarize the Bank of Orlinda on May 15, 1967.[10] One Linda Letos, who was also present in Florida with petitioner and other co-conspirators (A. 442), testified that during their stay petitioner and the others were talking about buying "tanks" to be used to cut through safes (A. 447–448). Miss Farmer testified that during their stay in Daytona Beach petitioner told her that

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[9] A stolen white Cadillac was later recovered by the FBI and identified by the hospital employee as being the car he had seen parked in the lot (A. 334–335, 336–338). Friends of co-conspirator Self testified to the circumstances surrounding the theft of the Cadillac (A. 338–339, 344–349).

[10] This attempted robbery was Overt Act 6, as to which Gary Ethridge, William Beard and James Ferguson, but not petitioner, were named as participants (A. 2).

he and the others were going to rob the Orlinda bank; he purchased "[o]xygen tanks" in Daytona which he took with him to Bowling Green, Kentucky (A. 407–408, 425–427; see also A. 439–440, 464–465). Miss Farmer was with petitioner when he transported the "tanks" to Bowling Green where they met Beard, Ferguson and one Jimmy Jenkins (A. 407–408, 427). Upon their arrival at Bowling Green on the weekend of May 15 (A. 411), petitioner told Miss Farmer that his purpose was to rob the Orlinda bank (A. 427; 409). He left her at a motel for a short time; he thereafter returned with Beard, advising that they had "case[d]" the bank (A. 409–410) and "it looked pretty good" (A. 412, 428). Miss Letos testified that she was present when petitioner, in the presence of Beard, Ferguson and Jenkins, said that the bank "was a cinch" and only one policeman patrolled the neighborhood. Petitioner stated that Gary Ethridge and Cole would participate in the robbery (A. 453).

Early on the morning of May 15, the Orlinda bank was broken into. The cashier, who lived in an apartment above the bank, testified that he had been awakened by noises and had switched on all of the lights in the bank (A. 433–434). At about 6:00 that morning his inspection revealed the breaking. In front of the vault he found "a set of acetylene torches" and "two tanks" (A. 434–435). Miss Letos testified that early that same morning she saw petitioner, Beard, Ferguson and one Jenkins. "[T]hey" told her that after they had gained entry to the bank and were "getting

ready to put the torch on the safe," a light went on and they heard someone say "we've got you now"; at this point, they fled (A. 459). Each had mud on his feet "because they ran through the mud and it was all messy from the rain the night before" (*ibid.*). At about 3:00 that morning, petitioner told Miss Porter that the attempted robbery had been all "fouled up," because "there was a watchman or a patrolman around the bank" (A. 412–413; 429). The following day petitioner left Bowling Green, telling Miss Farmer that his reason for leaving was to "plan another bank robbery" (A. 429–430).

III. EVIDENCE OF OTHER EVENTS

1. Petitioner was arrested by FBI agents on June 5, 1967, on the charge of unlawful flight to avoid confinement following his April 11 escape from the Tennessee State Penitentiary, and thereafter remained in confinement (A. 479–480).[11]

In essence, the evidence regarding the subsequent murder of Ferguson showed that in September 1967 some three months after petitioner's June

[11] The overt acts alleged to have occurred after that date dealt with the robbery on August 3, 1967, of the Third National Bank of Nashville by Beard and Self (Overt Act 9, and substantive counts 6 and 7; A. 3, 4–5) and the murder of Ferguson by Beard, at the counseling of Gary Ethridge, in late September 1967 (Overt Acts 10 and 11, substantive count 8; A. 3, 5).

The evidence relating to the participation of Self in the August robbery appears at Tr. 1752–1753, 2341, 2356, 2434–2436, 2440–2441, as to Beard relevant facts appear at Tr. 2392–2395.

arrest), Gary Ethridge asked Charles Bobo to kill Ferguson for "a fee" because the latter was trying to involve Ethridge "in some bank robberies * * *" (A. 237–238). Beard's sometime employer, one Carney (A. 392), testified that in August 1967 Beard told him that "Ferguson had stated he was going to cause him a lot of trouble by telling everything he knew on him"; Beard further told Carney that "he had to get rid of [Ferguson], he couldn't afford for him to go to Court on him" (A. 394, 395). Beard sought to borrow Carney's rifle but the latter refused to lend it and attempted to convince Beard not to kill Ferguson (A. 395–396). Linda Letos testified that she had a conversation with Gary Ethridge in which he inquired concerning her interview with the FBI; he told her that he was concerned "that someone had been giving some type of information about the banks" and said that "he had an awful lot to lose, and he would blow somebody's head off if they messed him up * * *" (A. 461).

Ferguson was shot and killed on September 23, 1967 (Tr. 3249). He managed to stagger to the front porch of a Mr. and Mrs. Watson. There was testimony that Ferguson told the Watsons and other passersby that Beard had shot him because he knew too much about some bank robberies (A. 202–208). The morning of Ferguson's killing, Beard told a friend, Vaughn, that he "had shot five times" at a person "that shot at him" and that "he was going to make three or four hundred or going to pick up" that sum (A. 209–

210).[12] No evidence was introduced in any way connecting petitioner with the killing of Ferguson.

Each of the defendants on trial (except petitioner) testified (see, *e.g.*, A. 499, 500–501, 505–529, 540–542). Petitioner presented no evidence in his own defense and did not cross-examine any of his co-defendants. His counsel's argument to the jury was that the government's witnesses were not worthy of belief.

2. In closing argument to the jury, the prosecutor stated the government's case on the conspiracy count as follows (Tr. 3636):

> We say that the agreement did exist. We say that at the center of this conspiracy, a man who instigated this entire arrangement and plan, was Mr. Gary Lee Ethridge, and Mr. Ethridge was the man who was at the center of this conspiracy plan from April, at its inception, through the 23rd of September when James Larry Ferguson was murdered.
>
> We say that other of these defendants may have entered or left this conspiracy as it proceeded. We start off in April with Sammy Ray Cole being involved, James Herman Bostic, and others. In June, Mr. Bostic leaves the conspiracy because he's arrested and sent to the penitentiary. So at that point of course, Bostic is no longer a party to the conspiracy, but nonetheless, this would not prevent this from being a single continuing conspiracy if you found that Mr. Ethridge continued to operate it and con-

[12] Earlier in September Beard had told Vaughn that "Ferguson was talking too much and had to be taken care of" (A. 209).

tinued to act as the head of the single on-going agreement.

By the same token, William Eugene Beard, we do not contend, was involved in this conspiracy at the beginning. We contend that he came into the conspiracy after the Bordeaux Bank robbery, and that his first act in furtherance of this conspiracy was the robbery or the burglary of the bank of Orlinda.

So the theory is, if there is a continuing conspiracy, individual members of the conspiracy can enter or leave the conspiracy, and they still may be liable if these acts were committed while they were members. So that's our theory and position.

IV. THE TRIAL COURT'S INSTRUCTIONS

The court first read the indictment, including the conspiracy count and the statement of overt acts (Tr. 3874–3877).[13] It then instructed on the general principles of conspiracy law (Tr. 3881–3883), pointing out, *inter alia*, that it was the government's position "that it was the purpose of the conspiracy to enter federally insured banks and to take therefrom money or other things of value exceeding one hundred dol-

[13] In subsequently referring to the overt acts, the court defined them as "act[s] apart from the conspiracy and performed to effect the object of the conspiracy" (A. 552). He instructed that it was necessary only for the jury to be "convinced beyond a reasonable doubt that one of these acts was knowingly performed in furtherance of the conspiracy in order to satisfy this particular requirement of the law" and that the "overt act requirement may be satisfied by evidence concerning the performance of an overt act by any of the alleged conspirators or by a duly-authorized agent of the conspirators" (A. 553).

lars" (Tr. 3886). The court read the provisions of 18 U.S.C. 2113(a), (c) and (d), the violations of which were the alleged objects of the conspiracy (Tr. 3887–3888). The court specifically postponed reference to subsection (c)—which refers to a killing during a bank robbery—with the comment that it would be "read later in connection with another charge" (Tr. 3888–3889).

The court further instructed that in order to convict, the jury had to find a single continuing conspiracy to rob federally insured banks; it admonished, however, that such a conspiracy was not transformed into separate conspiracies because new members joined and others departed (A. 554–555). With regard to withdrawal the court instructed that what was required was "some affirmative act clearly indicating that the conduct of the party withdrawing is inconsistent with his association with the conspiracy, and his connection with it is required in order to establish a withdrawal" (A. 554–555). Later in its charge the court elaborated further on withdrawal, observing that it may be based on "direct or circumstantial evidence" and "may be indicated by conduct wholly inconsistent with the theory of continuing adherence to the conspiracy" (A. 557). It further instructed "as requested by one of the parties * * *, that an accused * * * must join in the agreement to be guilty of conspiracy, and even if he commits an overt act, he does not violate the statute unless he does join in the agreement itself" (A. 558). The court had earlier charged that whether or not a particular defendant was a member

must be decided solely on "the evidence concerning his own actions, conduct, declarations or statements, and his own connection with the action and conduct of others" (A. 553).

Turning to the substantive charges, the court made clear that the murder charge in count eight involved only Ethridge and Beard (see, *e.g.*, Tr. 3912–3920).[14] Petitioner's trial counsel raised no objection and did not request any additional instructions (A. 561).

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioner was charged and convicted of two substantive counts dealing with the Bordeaux Bank robbery and one count of conspiracy to rob federally insured banks. While the murder of co-conspirator Ferguson and the inducement of that murder were charged as two of the eleven overt acts and in a substantive murder count, petitioner was not named as involved in either of these overt acts or charged in

[14] The court had earlier instructed (Tr. 3872):

> Each offense, and the evidence applicable thereto, should be considered separately, and you are to render separate verdicts on each count of the indictment which will be submitted to you. The fact that you may find one or more of the defendants guilty or not guilty of one or more of the offenses * * * should not control, must not control your verdict with respect to any other offense charged or with respect to any other defendant.
>
> Each defendant must also be considered as to guilt or innocence separately from any other defendant and separate verdicts rendered as to each defendant.

It had also pointed out that there were three categories of offenses before the jury—a conspiracy charge, a bank robbery charge and "the killing charge" (Tr. 3873–3874).

the substantive count. Nor did the conspiracy count include any charge of conspiracy to murder, as we erroneously stated in our brief in opposition in this case. Moreover, government counsel said explicitly in his closing argument that it was the prosecution's theory that petitioner had left the conspiracy three months before Ferguson's murder by virtue of his arrest, and was not responsible for what occurred thereafter (see *supra*, pp. 12–13). The government's evidence did not in any way tie petitioner to the planning of the murder; it pointed the other way—that his participation began soon after his prison escape in April 1967 and ended with his arrest on June 5, 1967.

Accordingly, while we agree with the court below that "this conspiracy continued until after the murder had been committed" in light of the "evidence that killing of informants was a part of the general plan for operation of the bank robbery ring" (A. 58), we submit that that view is substantially irrelevant to the validity of petitioner's conviction and need not be considered here. The court of appeals' discussion of this point may have been affected by a misapprehension on its part as well that the conspiracy count charged conspiracy to murder rather than a simple conspiracy to rob as to which the murder was referred to only incidentally as one of the eleven overt acts (see A. 37). And although the court—erroneously we think in light of the evidence and the prosecutor's explicit concession—expressed the view (A. 58) that petitioner remained in the conspiracy at the time of the murder notwithstanding his incarceration, that conclusion was

not necessary to the affirmance of his conviction, whatever its relevance to the convictions of other co-conspirators. For, as we shall urge, the direct evidence of acts that took place before petitioner's incarceration overwhelmingly showed both that he had then been a member of the conspiracy and that a number of the overt acts charged (including the Bordeaux robbery in which petitioner was a principal) took place during that earlier period. There is no indication in the record of the trial that the jury had any reason whatever to consider the murder or anything else that followed the arrest in its determination of petitioner's guilt.

For similar reasons, we urge in Point I of our Argument that there is no substantial issue in this case as to the admissibility of the few extrajudicial statements by petitioner's co-conspirators that may have borne on his guilt. Such statements were plainly a minor factor in the overwhelming proof against petitioner, which was based primarily on direct testimony about his participation and his own admissions. No statement mentioning petitioner related to the post-arrest period, and the statements either fell narrowly within the familiar hearsay exception for co-conspirator declarations in furtherance of the conspiracy during the time when petitioner was clearly a participant, or else were restricted to the impeachment of a testifying co-defendant.

As we view the case, the only matter arising out of the murder of Ferguson that is remotely relevant to petitioner involves joinder: Was petitioner fatally prejudiced by being tried together with the two de-

fendants charged with the substantive offenses of murder and by the introduction of evidence concerning the murder? Our position on this issue, which we develop in Point II of the Argument, is that since the conspiracy was so plainly unitary in nature (even though petitioner dropped out before its termination) and since his lack of responsibility for the murder was made so manifest by the evidence, a severance was not required to afford him a fair trial. Nor was petitioner in any other sense (as we urge in Point III) denied a fair trial.

Accordingly, we do not believe that the case raises and thus will not treat the issue whether a member of a conspiracy who is incarcerated before a conspiracy's termination may be bound by the declarations of other members made in the process of seeking to conceal the agreement's existence by killing a member who they fear is going to confess to the authorities. That question is not here, *inter alia,* because the record shows that this was not the theory under which the government tried this case or the court submitted it to the jury. There is, in short, no reason for the Court to reconsider the long-standing federal evidentiary rule precluding application of the traditional co-conspirator hearsay exception to the concealment phase of a conspiracy. See *Grunewald* v. *United States,* 353 U.S. 391, 399–406; *Krulewitch* v. *United States,* 336 U.S. 440, 443–444; *Lutwak* v. *United States,* 344 U.S. 604, 616–617. Were the issue actually posed, we would argue that under *Dutton* v. *Evans,* 400 U.S. 74, this rule is merely evidentiary and not

compelled by the requirements of the Confrontation Clause of the Sixth Amendment.[15] Whether to depart from the federal evidentiary rule announced in the *Krulewitch* and *Grunewald* rulings would, however, be a different and more difficult issue. That rule is "intertwined not only with the federal substantive law of conspiracy, but also with such related issues as the impact of the statute of limitations upon conspiracy prosecutions." *Dutton* v. *Evans, supra,* 400 U.S. at 82. This evidentiary question involves weighty considerations of federal policy which militate strongly against its reconsideration except where necessarily put in issue by a concrete case. This is not, we submit, such a case.

I

PETITIONER'S CONVICTION IS OVERWHELMINGLY SUPPORTED BY EVIDENCE OTHER THAN THE STATEMENTS OF CO-CONSPIRATORS, WHICH WERE IN ANY EVENT PROPERLY ADMITTED UNDER NARROW TRADITIONAL PRINCIPLES.

As his "primary contention" (Pet. Br. 17, 19–27), petitioner argues that the co-conspirator hearsay rule as applied here violates the Confrontation Clause of the Sixth Amendment. This contention wholly overlooks the fact that the government's case against him was primarily presented and amply proved by direct evidence

[15] As the opinion of Mr. Justice Stewart in *Dutton* v. *Evans, supra,* points out, 400 U.S. at 82–83: "It is clear that the limited scope of the hearsay exception in federal conspiracy trials is a product, not of the Sixth Amendment but of the Court's 'disfavor' of attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions * * *."

independent of any evidence whose admissibility depended upon the co-conspirator exception to the hearsay rule. Moreover, to the extent that the rule was the basis for the admission of evidence, this is hardly a ground for complaint since the validity of the rule as narrowly applied here—both as a constitutional and federal evidentiary matter—has long been settled and was expressly endorsed in this Court's decision this Term in *Dutton* v. *Evans*, 400 U.S. 74, 81.

1. Petitioner concedes (Pet. Br. 9) that if the government's "clearly admissible" evidence against him was believed by the trier of fact—and the jury's verdict, we submit, attests to the fact that it was—that evidence is sufficient to support his conviction for bank robbery and for participation in a conspiracy lasting from April 21 to June 5, 1967, the date when he was arrested. And the weight of that "clearly admissible" evidence plainly overwhelmed the limited amount of pertinent evidence in the form of co-conspirators' statements.

The direct evidence against petitioner, set forth in detail in the Statement, included the testimony of severed co-conspirator Leeman, whose major contribution was a description of the planning of the Bordeaux robbery and of the escape which was to follow; he testified that these plans were developed at a three to four hour meeting in which he as well as petitioner participated. Nor did Leeman's testimony stand alone. Miss Farmer and Miss Letos (and to a lesser extent Miss Burton) testified to admissions made by petitioner that overwhelmingly established his guilt both of the robbery of the Bordeaux bank and of his participa-

tion in the conspiracy. Moreover, the testimony of these witnesses was consistent with and corroborated by bank employees and others who testified about the details of the Bordeaux robbery and the efforts to burglarize the Orlinda bank.

It is thus plain that if this case raises any issues regarding the co-conspirator rule, it does so only in a tangential and peripheral way. By the same token, if there were some instances where inadmissible hearsay outside of that rule was introduced into evidence, these were so minor as to have no impact in the overall context.[16] See *Chapman* v. *California*, 386 U.S. 18; *Harrington* v. *California*, 395 U.S. 250; *Frazier* v. *Cupp*, 394 U.S. 731, 735–737. We shall, however, go on to examine the specific instances at trial where out-of-court statements relating to petitioner were admitted. We think it clear that there is no serious ground for objection to those occasional bits of evidence, all of which related to the period before petitioner's incarceration.

2. While not clearly spelled out, petitioner's hearsay objections appear to be aimed principally at certain minor portions of Leeman's testimony which were based on information acquired by him from co-conspirators, and at the cross-examination of co-conspirator Beard regarding prior inconsistent statements

[16] As this Court pointed out in *Bruton* v. *United States*, 391 U.S. 123, 135: "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently."

which to some extent reported what Beard had been told by other conspirators about the commission of the Bordeaux robbery and Ferguson's murder.

a. Apart from the bulk of Leeman's testimony already adverted to, he testified to certain other matters which might be said to involve the co-conspirator hearsay rule. He stated, for example, that petitioner had broken out of the penitentiary and needed money. Leeman was uncertain as to whether he was told this by Ferguson or petitioner, but if it came from Ferguson it was during the early stages pertaining to the planning of the Bordeaux bank robbery (A. 281–282); in addition, since he was not present during that robbery and did not assist in the actual escape, Leeman must have obtained his information about those happenings from Ferguson, or later that day from petitioner at the meeting held to divide the stolen money (see A. 289–290, 293–294). If the information came from petitioner, it was plainly admissible as his admission. Assuming that it came from Ferguson, its admissibility involved the co-conspirator exception in its normal, long-established application—*i.e.*, to statements by a co-conspirator in furtherance of an ongoing conspiracy. See, *e.g.*, *Dutton* v. *Evans*, 400 U.S. 74, 81; *Wong Sun* v. *United States*, 371 U.S. 471, 490.[17] Similarly the information from Ferguson

[17] Of course, the fact that Ferguson was dead at the time of trial did not render his statements in furtherance of the scheme inadmissible. See, *e.g.*, *Delaney* v. *United States*, 263 U.S. 586, 590. For an extended discussion of the rationale of the co-conspirator exception to the hearsay rule see the Brief for United States as *Amicus Curiae* in the *Dutton* case (No. 10, this Term, pp. 10–18).

(testified to by Leeman) that the robbery and escape went without a hitch emboldened the conspirators to continue further in their illegal venture and thus furthered the unlawful scheme. And the earlier statements made to Leeman by Ferguson that petitioner was being recruited to assist in the robbery, was obviously in direct furtherance of the ongoing venture.

b. The hearsay statements mentioning petitioner which were elicited during the testimony of co-conspirator Beard involve somewhat different considerations. That testimony did not relate to statements in furtherance of the conspiracy, but it was not offered by the government or allowed into evidence as proof of petitioner's guilt. Rather, it was properly admitted for narrowly limited purposes.

(i) Beard testified in his own defense, in large measure to the effect that he had not murdered Ferguson (see, *e.g.*, Tr. 3236–3240, 3244–3246, 3249–3288, 3290–3300). While Beard was on the stand, the district court specifically instructed the jury that any of his statements made after his arrest could be considered only against him and not against any other defendant (A. 507). Beard had in fact been interviewed by FBI agent Hillin on seven occasions between May and October 1967;[18] Agent Hillin had previously testified that such interviews (preceded by *Miranda* warnings) had taken place and that he had obtained information about the Bordeaux robbery from Beard, but Hillin had related none of the de-

[18] Beard was initially arrested on June 5, 1967 (A. 479); he was thereafter out on bail until his arrest in September 1967, following Ferguson's murder. (472–474).

tails of this information and had not mentioned petitioner's name in his testimony (A. 478, 483–488, 491).

On cross-examination by the government, Beard admitted that Ferguson had described the Bordeaux robbery to him (A. 511–513); he also had heard petitioner talking about the robbery, but not in detail (A. 513). At this point, the prosecutor asked if Beard recalled attending a meeting held at Gary Ethridge's house during May 1967. Counsel for certain of the co-defendants (but not for petitioner) objected, and government counsel said that he intended to go into the details about the meeting and to cross-examine on the basis of a pretrial statement Beard had made about the meeting. In the presence of the jury, the Court stated that this would be admissible to test Beard's credibility (A. 514).

Beard was then asked about a statement he had given to agent Hillin when the latter visited his house in July (A. 514). This statement was that Beard had attended a meeting in May at Gary Ethridge's house to plan a robbery; the meeting was attended by Ferguson, Gary Ethridge, petitioner and one Jenkins, and the prior Bordeaux robbery was discussed by Ferguson and Ethridge and, to a lesser extent, by petitioner (A. 515).[19] Beard admitted making the

[19] The pertinent portion of the statement made by Beard to FBI Agent Hillin was that at this meeting "Fish [Ferguson] and Gary [Ethridge] at that time said the robbery for this time would be a cinch, that it would be just like the Commerce Union at Bordeaux which they had pulled" (A. 515–516).

statement to the FBI, but initially testified that it was a lie (A. 515–516). As the cross-examination progressed, he admitted making a statment to the agent that the Bordeaux robbery was planned by Gary Ethridge and Leeman, but said he could not "say of [his] own knowledge whether it was true or false" (A. 517). He then admitted making statements to FBI Agent Hillin that Ferguson had "pulled" petitioner into the Bordeaux robbery, but indicated difficulty in remembering exactly who had given him the information (A. 517–520).[20] He indicated that most of the information regarding that robbery came from Ferguson, but did not recall who else was present at the time (A. 521–522). He then read the statement and recalled that he had told Agent Hillin that the information "was gotten from Ferguson, Bostic and Ethridge * * *" (A. 524). At this juncture, Beard said that he believed that petitioner had shown him the place where he had jumped out of the Cadillac and hid in the woods following the Bordeaux robbery and that petitioner had buried a sack of fifty dollars in pennies there (A. 524, 526). He also admitted as "probably true" the statement he had made that he was present with Ferguson, Gary Ethridge, and petitioner when Ethridge held up a shotgun and

[20] Several times during cross-examination Beard stated in the jury's presence that he had invented the May meeting (A. 524–526), but he did not in his subsequent cross-examination deny that he had received information about the Bordeaux robbery from his fellow conspirators on other occasions.

stated that it had made them a lot of money (A. 528–529).

When the cross-examination of Beard turned to a subsequent statement (made to Agent Hillin after Beard's second arrest following Ferguson's murder) that he knew that Ferguson had reported that Self had tried to kill him, counsel for Self objected (A. 530–532). The judge then specifically instructed the jury that the statement was admitted [21] "solely with respect to what effect it may have on the credibility" of Beard (A. 536). He further cautioned the jury not to consider the prior statement "as evidence" against Self (the only one implicated by Beard's post-arrest statement regarding Ferguson's murder) on any counts of the indictment in which Self was named and that "includes the conspiracy count and the robbery counts" (A. 536).

In his final charge to the jury, the judge said (A. 548–549):

> Prior inconsistent statements are not in and of themselves, as I have instructed you during the course of the trial, substantive evidence. They may be used, however, on cross-examination for purposes of impeachment or to refresh

[21] In the jury's presence, Beard admitted that he had told FBI Agent Hillin on October 11, 1967, that he had "heard" that Self had attempted to kill Ferguson and that he received information from Ferguson that an attempt had been made on his life (A. 534–535). He testified, however, that while he may have made the statement, it was "not true" (A. 535) and he did not know who killed Ferguson (A. 535–536).

> a witness' recollection or where a party is taken by surprise by his own witness' testimony, the Court may permit the pretrial statement to be used as the basis for cross-examining the witness in an effort to have him accept such statement in whole or in part as his present testimony. To the extent that he does so, his present testimony is substantive proof to be weighed as to credibility and value by the jury, but in that event, it is the witness' present testimony that constitutes substantive proof, and not the prior inconsistent statement.

(ii) To the extent that Beard testified to what petitioner himself had told him concerning the Bordeaux robbery, this would be no different than statements petitioner had made to Miss Farmer and Miss Lotos and was properly admissible against petitioner as his own admissions. It is doubtful, however, that the jury considered even these as to petitioner inasmuch as most seemed to relate to the May meeting which Beard denied having taken place, and the trial court admonished the jury that only if a witness adopted a prior statement during his trial testimony could it be considered as substantive proof of the events.[22]

For the same reason, it is fair to conclude that the jury did not consider against petitioner Beard's out-of-court statements concerning what other members

[22] Under *California* v. *Green*, 399 U.S. 149, petitioner thus received more than he was constitutionally entitled to by that instruction. *Green* makes clear that the Constitution would allow the prior statement to be considered as substantive proof.

of the ring had told him about the Bordeaux robbery.[23] At all events, reference to these statements at trial for the limited purpose of attacking Beard's credibility was proper under familiar principles and does not bring this case within the rationale of *Bruton* v. *United States*, 391 U.S. 123, as petitioner suggests (see Pet. Br. 25–26). Here the government merely sought to impeach a co-defendant *who took the stand* by asking him about prior statements. *Bruton* involved the materially different situation where "the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant [and who does not testify], are deliberately spread before the jury in a joint trial" 391

[23] Although in the special setting of this case there is no reason to reach the issue, we seriously question whether, at least as a constitutional matter, these statements attributed to other co-conspirators would have been inadmissible against petitioner. There was a strong indication that Beard was telling the truth when he made the statement to the F.B.I. regarding what his fellow conspirators had told him of the Bordeaux robbery. There was thus overwhelming independent evidence that petitioner and those who described the events to Beard had participated in the Bordeaux robbery; there was no apparent reason for these other conspirators to lie to Beard; and it was against their penal interest to make these statements. See *Dutton* v. *Evans*, *supra*, 400 U.S. at 88–89.

Moreover, not only was Beard available for cross-examination by petitioner but so were the other defendants, who all testified in their own defense. Yet petitioner failed to avail himself of that right as to any of the defendants. See *California* v. *Green*, 399 U.S. 149, 153–164.

U.S. at 135–136.[24] Indeed, the dissimilarity between the two situations is particularly emphasized in this case by the fact that the statements given by Beard to the FBI relating to petitioner added nothing to the overwhelming independent evidence of petitioner's guilt established through testimony introduced as part of the government's direct case. See *Dutton* v. *Evans*, *supra*, at 88, and the concurring opinion of Mr. Justice Blackmun, 400 U.S. at 90–93.

In sum, even if one accepts the highly doubtful proposition that certain portions of the evidence adduced during the government's cross-examination of Beard were considered against petitioner by the jury despite the trial court's instructions,[25] such considera-

[24] Such limited use of a co-defendant's prior statement to impeach him as a witness has been held consistent with the *Bruton* rule by the lower federal courts. See, *e.g.*, *United States* v. *Ballentine*, 410 F. 2d 375 (C.A. 2), certiorari denied, 397 U.S. 928; *United States* v. *Boone*, 401 F. 2d 659 (C.A. 3), certiorari denied *sub nom. Jackson* v. *United States*, 394 U.S. 933.

[25] Although the trial court's instruction during the trial regarding limited use did not expressly refer to petitioner as it did to co-defendant Self, this was obviously due to the fact that the court delivered this particular admonition immediately following reference to Beard's statement concerning the murder of Ferguson in which no reference was made to petitioner (see *supra* p. 26). We deal more directly in Point II with the question whether the introduction of evidence of the murder supports petitioner's contention that he was the victim of prejudicial joinder, and urge that he was not.

tion would have been harmless given the quality and quantity of other plainly admissible evidence which convincingly established his guilt on the conspiracy and substantive counts.[26]

II

PETITIONER WAS PROPERLY TRIED WITH HIS CO-DEFENDANTS EVEN THOUGH HIS ARREST CAUSED HIS WITHDRAWAL FROM THE CONSPIRACY BEFORE ITS TERMINATION

1. Petitioner was not named in the substantive count charging the murder of Ferguson. He was named only as a co-conspirator in the charge of conspiracy to rob banks, as to which some of the eleven overt acts charged involved events occurring after petitioner's arrest, including the murder of Ferguson.[27] As we have urged, there can be no doubt that petitioner was a member of the conspiracy to rob

[26] One Carney, Beard's sometime employer, also testified that he had a conversation with Beard about the Bordeaux bank robbery (in which Beard had not participated) several months after the robbery. He stated that during this conversation Beard told him that "thirty thousand dollars" had been taken, but that it was not a lot of money when divided five ways. Petitioner was not named in Carney's testimony, and the jury was instructed to consider his testimony only against Beard (A. 396–397). It could not seriously be contended that this incidental reference (followed immediately by insulating instructions) to a matter regarding which there was overwhelming support in the record by unchallenged admissible evidence had any impact in this lawsuit. See *Frazier* v. *Cupp*, 394 U.S. 731, 735–736.

[27] Petitioner was not named in any overt act occurring after his arrest in June 1967.

banks. As discussed in Point I, there was overwhelming evidence of his participation in the Bordeaux robbery; the evidence that he remained a part of the conspiracy and participated in the unsuccessful Orlinda robbery was equally overwhelming, consisting of proof of his own acts and declarations.

On the other hand, there is nothing in this record which would support the view that petitioner was a member of the conspiracy at the time the plan to murder Ferguson was developed and carried out. Whatever might have been the situation if the murder of Ferguson had been contemplated or planned before petitioner was arrested (cf. *Pinkerton* v. *United States,* 328 U.S. 640), there is no evidence in this record that such was the situation here. Petitioner was arrested on June 5, 1967, and, so far as this record reveals, the plans for Ferguson's murder did not take root until several months thereafter. There is also nothing in the record to show that any of the remaining conspirators visited or took an interest in petitioner after he was arrested. Under these circumstances we believe that petitioner's arrest effectuated his withdrawal from the conspiracy whatever subjective desire he may or may not have had to continue as one of the group. That is particularly true since the murder of Ferguson, while obviously an outgrowth of the robberies, was not the basis for a conspiracy charge and was not so involved in the original scheme to rob banks that it could be said to have been within the contemplation of the conspiracy at the time petitioner joined in April or before he withdrew

in June. Cf. *Pinkerton v. United States, supra,* 328 U.S. at 646; *Fiswick v. United States,* 329 U.S. 211, 217.

Although the trial judge did not affirmatively charge the jury that petitioner had been withdrawn from the conspiracy by his arrest, leaving the issue of withdrawal technically as one of fact for the jury,[28] the United States Attorney stated unequivocally that the government regarded petitioner as having been withdrawn from the conspiracy by virtue of his arrest; he stated that "In June, Mr. Bostic leaves the conspiracy because he's arrested and sent to the penitentiary. So at that point of course, Bostic is no longer a party to the conspiracy * * * (Tr. 3636; the statement is set forth more fully at pp. 12–13, *supra*). The instructions to the jury must be read in the light of this statement, and the fact that nothing in the evidence tied petitioner into the conspiracy after his arrest; indeed the evidence points entirely the other way.

The trial court deemed withdrawal in general an issue of fact for the jury to resolve; accordingly it did not instruct that the evidence of the overt acts dealing with Ferguson's murder could not be relied upon

[28] The obvious implications of the court's instructions were that if the jury found withdrawal as to a particular defendant, it could not consider against him any acts or statements of co-conspirators after that date. We are unable to find any request by petitioner that this be spelled out further, nor has our examination disclosed any indication in the record that any specific charge on arrest as constituting withdrawal was ever requested by petitioner's counsel. After the final instructions were given, petitioner's counsel indicated that he had no requests for additional instructions (A. 561).

to establish the existence of the conspiracy as a punishable crime[29] as regards petitioner. In retrospect, we think such an instruction would have been appropriate in view of the evidence against petitioner and the government's categorical submission concerning petitioner's limited participation. Nevertheless, this omission was not prejudicial in the circumstances. Cf. *United States* v. *Agueci*, 310 F. 2d 817, 839–840 (C.A. 2), certiorari denied, 372 U.S. 959. The trial court did make clear that commission of any one of the eleven overt acts would suffice to meet the statutory requirements of 18 U.S.C. 371; that a defendant's own conduct and declarations were the crucial determinants of his membership in the scheme; that mere commission of an overt act without membership in the venture was insufficient to convict; and, implicitly, that withdrawal terminated a participant's responsibility for subsequent activities of the conspiracy. Viewed in light of the United States Attorney's concession and the plain import of the evidence, petitioner's arrest would naturally and normally be treated by the jury as conduct wholly inconsistent with any theory of his continued adherence to the conspiracy.

2. This case thus presents no issue of imputing to petitioner acts done or statements made by others (including the murder) after petitioner's arrest. Rather, as to petitioner, the question is the different

[29] At common law an overt act was not necessary to establish a conspiracy; it is required under 18 U.S.C. 371, and the statute of limitations commences to run, unless otherwise suspended, from the last overt act during the conspiracy. See, *e.g.*, *Fiswick* v. *United States*, *supra*, 329 at 216.

one whether it was unfair to try him with certain co-defendants who were also charged in the separate substantive count with murdering a co-conspirator. When the record is examined as a whole, this circumstance did not render the joint trial unfair.

a. There clearly was a single conspiracy centered around Ethridge which contemplated bank robberies as an ongoing business venture. The murder of Ferguson was obviously designed not simply to conceal robberies that had already occurred but to enable the central conspirator Gary Ethridge to remain free to continue in the business of planning and executing bank robberies. All the substantive counts—including the murder charge—were thus interwoven with the conspiracy. In these circumstances, the joinder of counts was proper even though all defendants were not charged in all counts. Rule 8(b), F.R. Cr. P., allows the joinder of defendants "in the same indictment * * * if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." This Rule specifically provides that all defendants need not be named in all counts for joinder to be justified.

The original joinder being proper, the issue narrows to the question whether petitioner was so prejudiced that a severance was required under Rule 14, F.R. Cr. P. Resolution of that question essentially rested in the sound discretion of the trial judge. *Schaffer* v. *United States*, 362 U.S. 511, 514–517; *Opper* v. *United States*, 348 U.S. 84, 95. There was no abuse of discretion in

refusing a severance in this case. A trial of six defendants, in and of itself, can hardly be said to be massive, and, although there was extensive evidence produced, the factual issues were not complex. See *United States* v. *Roselli,* 432 F. 2d 879, 898–902 (C.A. 9), certiorari denied February 22, 1971 (No. 1029, this Term); see also *United States* v. *Agueci, supra.* The evidence against petitioner was clear and easily compartmentalized; and he was clearly out of the picture after his arrest. His participation in the conspiracy was shown by direct evidence relating to both the Bordeaux and Orlinda robberies; substantively he was charged only with the Bordeaux robbery. There is no reason to believe that "the jury in reaching the verdicts it did improperly considered evidence material only to the guilt of others or to the proof of other offenses." *United States* v. *Rabin,* 316 F. 2d 564, 568 (C.A. 7); *Fernandez* v. *United States,* 329 F. 2d 899, 906 (C.A. 9).

This is especially evident in this case since the selective verdicts as to the various co-defendants who were lesser members of the conspiracy—as was petitioner—show that none of the defendants were swept into a conviction by a finding of "mass" guilt. See *Posey* v. *United States,* 416 F. 2d 545, 550–551 (C.A. 5), certiorari denied, 397 U.S. 946; *United States* v. *Vida,* 370 F. 2d 759, 765–766 (C.A. 6), certiorari denied, 387 U.S. 910; *Barnes* v. *United States,* 381 F. 2d 263, 264 (C.A.D.C.); *United States* v. *Jordan,* 399 F. 2d 610, 615 (C.A. 2), certiorari denied, 393 U.S. 1005. While murder is a crime which juries are not

likely to regard lightly, it was made clear to the jury, from the evidence and the summation of government counsel, that petitioner was not involved in the murder. Indeed at the very start of the trial on the *voir dire* of the jury, petitioner's counsel noted that his client was not charged with murder and asked whether the jurors would be prejudiced because he had consorted with men so charged (Tr. 794–798, 841–42, 1052). The United States Attorney in his opening statement said that the first item that the government expected to prove was the murder of Ferguson "by William Eugene Beard induced, and counseled to do so by the defendant, Gary Lee Ethridge" (Tr. 1158). The testimony of Beard said to implicate petitioner has already been discussed (see *supra* pp. 23–28).[30] The other defendants hardly mentioned petitioner at all—and certainly not in connection with the murder.

b. There is a strong public interest in joint trials in appropriate situations. They expedite the administration of justice, reduce the congestion of trial dockets, conserve judicial time, lessen the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoid the necessity of recalling witnesses, who would otherwise be called upon to testify more than once. *Parker* v. *United States*, 404 F. 2d 1193, 1196 (C.A. 9), certiorari denied, 394 U.S. 1004; *Bayless* v. *United States*, 381 F. 2d 67, 72 (C.A. 9). Undoubtedly, this interest does not outweigh the right of a defendant to a fair trial. Cf. *Bruton* v.

[30] At most his post-arrest statements relating to the murder used for impeachment focused on co-defendant Self and in no way involved petitioner (see *supra* p. 26).

United States, 391 U.S. 123, 134. It is our submission, however, that nothing in this joint trial could be said to endanger petitioner's rights in that regard.

III

PETITIONER'S REMAINING CONTENTIONS ARE WITHOUT MERIT

In cursory fashion, petitioner submits for the Court's consideration a variety of other issues (Pet. Br. 30–33) that he terms "highlights of the prejudicial manner in which this trial was conducted" (Pet. Br. 30). These claims are plainly without merit and warrant but summary discussion.

A. *An impartial jury was properly impaneled.*

The claim that the jury was prejudiced against petitioner has no support in the record. Petitioner was at most a minor figure in the conspiracy. There is no evidence of extraordinary publicity implicating him in the robberies or as a member of the gang of bank robbers; and an extensive *voir dire* examination was conducted before the trial judge overruled the motion for a continuance [31] and for a change of venue. After five days of jury interrogation the court said that it was "satisfied it's a fair and impartial jury, as fair and impartial as it's possible to obtain" (A. 186). He observed that (A. 184–185):

[31] Petitioner points out no prejudice to his defense arising from the denial of the continuance. The reasons favoring a joint trial also militate in favor of a speedy trial so long as it is not so speedy as to prevent an adequate preparation of the defense. There is nothing to indicate in this case that the defense was inadequately prepared.

> You have to reconcile the right of a fair trial with the freedom of the press. You have to make the necessary adjustment, because those are two fundamental basic rights under our system. In this case I was particularly interested in determining whether or not it would be possible to impanel a fair and impartial jury in view of the publicity which has occurred, and in this case there has been, considering the number of jurors who have been interrogated, there have been a remarkably few in number who have said that newspaper publicity has had anything to do with their thinking until today, strange as it may seem.
>
> A few of the prospective members of the jury, apparently with the idea in mind that this would be a good way to get off a jury, particularly a jury that was to be locked up, made a statement that they had an opinion derived from publicity, but I've satisfied my mind that you couldn't get a fairer jury regardless of what district you went to in this case.[32]

The questioning of the panel by the prosecutor as to possible bias against a member of the conspiracy who made a bargain with the prosecutor for his testimony (*i.e.*, Leeman) was within the bounds of propriety.

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[32] The charge that the prosecutor "suggested special instructions to discourage jurors from admitting they had been prejudiced by newspaper publicity" (Pet. Br. 30), apparently refers to the discussion between the prosecutor and the district court about the problem presented by prospective jurors who, in increasing numbers through the course of the five-day selection period, were obviously coming to the conclusion that by claiming to have fixed opinions about the case, they could avoid the burden of jury service. The prosecutor merely asked that the district court emphasize the importance of jury

Although Leeman was not, as petitioner contends, a "leading member" of the conspiracy, his testimony was important in setting forth the full scope of the conspiracy and the government was entitled to uncover any bias of potential jurors arising from his status. Moreover, jurors who were excused by the prosecutor on this basis were ordered excused under the government's peremptory challenges (Tr. 789–792, 836, 838, 914–916, 983–985, 1043–1045). See *Swain* v. *Alabama*, 380 U.S. 202, 218–222.

B. *The trial was properly conducted by the trial judge.*

1. The order of proof at trial is discretionary with the trial court. If the government had attempted to prove the murder at the end of the case, it might well have been urged that the government sought to inflame the jury immediately before it retired to consider its verdict. In any event, as we have argued, petitioner was not charged with the murder and the jury was not confused—either purposely or inadvertently—into thinking that he was.

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service and the responsibilities that are a part of it, so as to deter claims of a fixed opinion merely to avoid service (Tr. 1024–1025). The district court recognized that "they've gotten on to the idea that its going to be a lock-up jury." In accord with the prosecutor's suggestion if informed the next group to be examined that (Tr. 1028):

> You have been called here to perform what is one of the most important civic duties which a citizen of the United States has to perform, and that is serve on a jury in an important criminal case for the purpose of doing justice between the parties.

This was clearly an appropriate admonition simply detailing the essence of any juror's obligation.

2. Insofar as we have been able to ascertain from an examination of the record, the gun seized from Gary Ethridge in September 1967 was not introduced into evidence. However that may be, the entry, arrest, and search at the Ethridge's house did not involve petitioner and provided no evidence against him.

3. Notwithstanding petitioner's contention (Br. p. 31), his escape from the penitentiary was an inherent element of Overt Act eight, which charged Beard with harboring petitioner (A. 2). Moreover, it was relevant to the substantive counts regarding the Bordeaux bank robbery in that it tended to show petitioner's need for funds to flee the area. See *Bayless* v. *United States,* 381 F. 2d 67, 72 (C.A. 9). Our examination of the record has revealed no indication that the jury was informed of the basis for petitioner's original incarceration.

4. Evidence concerning the stolen automobiles was relevant and necessary in fully developing the details of the Bordeaux bank robbery. Petitioner does not indicate how the evidence of any "unconnected prior crimes and incarceration of various parties and non-parties" (Pet. Br. 31) inflamed the jury or prejudiced him.

5. Several government witnesses at trial repudiated their out-of-court statements to the FBI and the United States Attorney. One admitted at trial that she was afraid (A. 345). Another witness flatly denied making a statement to the FBI, and the district court, at the prosecutor's request, informed him that he could be prosecuted for perjury (A. 372). These

instances can hardly be characterized as "repeated attempts to convince the jury by innuendo that the defendants had terrorized government witnesses" (Pet. Br. 31).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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